

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SJR 534

INTRODUCER: Judiciary Committee and Senator Fasano

SUBJECT: Pledge of Allegiance/Public Schools

DATE: March 30, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Matthews</u>	<u>ED</u>	Favorable
2.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This Senate Joint Resolution proposes the amendment of s. 1, art. IX, Fla. Const. Language in this joint resolution requires district school boards to adopt rules to mandate the daily recital of the Pledge of Allegiance (Pledge) in all pre-kindergarten through grade 12 public schools.

This joint resolution includes the exact words of the Pledge of Allegiance to be recited and requires students to stand with their right hands over their hearts during recital. Men are not permitted to wear headdresses during recital, except for religious reasons.

A notice is required to be posted in a conspicuous place that states that students have the right to refuse to participate in the Pledge, and a student must be excused, upon written request from a parent or guardian.

This joint resolution provides for the language to be placed on the ballot at the next general election or at an earlier special election specifically authorized by law for that purpose.

II. Present Situation:

Pledge of Allegiance in Federal Law

The Pledge of Allegiance is included in federal law as follows:

“I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”¹

Federal law also provides that the Pledge should be recited by standing at attention facing the flag with the right hand over the heart. Additionally, when not in uniform, men should remove any non-religious headdress with their right hand, and hold it at the left shoulder.²

Pledge of Allegiance in State Law

Section 1003.44, F.S., provides that each district school board may adopt rules to require programs that encourage greater respect for the government of the United States and its national anthem and flag, subject to federal and state law. “The pledge of allegiance to the flag ‘I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all,’ shall be rendered by students standing with the right hand over the heart.”³ When the Pledge is given, civilians are required to show full respect by standing at attention, and men are required to remove any headdress, pursuant to federal law, unless it is worn for religious purposes.

Each student shall be informed of his or her right to not participate in reciting the Pledge by posting a notice in a conspicuous place. Upon written request by the student’s parent, the student must be excused from reciting the Pledge.⁴

Section 1002.20(12), F.S., requires a public school student to be excused from reciting the Pledge of Allegiance upon written request by the student’s parent, in accordance with s. 1003.44(1), F.S.

Additionally, s. 1003.44(2), F.S., authorizes a district school board to allow any teacher or administrator to read or post in a public school building the Pledge of Allegiance. Section 1003.44(2), F.S., further provides that any material that is read may be presented only from a historical perspective and in a nonproselytizing manner.

Joint Resolutions to Amend the State Constitution

Under s. 1, art. XI, Fla. Const., amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment must then be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.⁵

¹ 4 U.S.C.A. § 4 (West 2002).

² *Id.*

³ Section 1003.44(1), F.S.

⁴ *Id.*

⁵ Section 5(a), art. XI, Fla. Const.

The Supreme Court has typically applied a presumption of validity to amendments that are proposed by the Legislature.⁶

Section 101.161(1), F.S., requires that whenever a constitutional amendment is submitted to the vote of the people, the substance of the amendment must be printed in clear and unambiguous language on the ballot. The wording of the substance of the amendment and the ballot title to appear on the ballot must be embodied in the joint resolution.⁷

III. Effect of Proposed Changes:

Subject to voter approval, this Senate Joint Resolution would essentially codify in the State Constitution the current statutory requirements relating to the Pledge of Allegiance; however, each district school board would be required, instead of permitted, to adopt rules to require the recital of the Pledge of Allegiance to the American flag at the beginning of each day in every pre-kindergarten through grade 12 public school. Under this joint resolution, students will be required to stand with the right hand over the heart to deliver the standard Pledge of Allegiance. This joint resolution requires notice to be posted in a conspicuous place that students have the right not to participate in reciting the Pledge. Upon written request by his or her parent or guardian, the student must be excused from reciting the Pledge. When the Pledge is given, civilians are required to show full respect by standing at attention, and men are required to remove any headdress, pursuant to federal law, unless it is worn for religious purposes.

The wording of the amendment may cause some confusion whether a student who is excused from reciting the Pledge is still required to stand at attention to show full respect. If it is the Legislature's intent that excused students are not required to stand at attention to show full respect, the Legislature may wish to modify the wording to clarify its intent. Federal cases suggest that students' right to free speech⁸ is not violated when those who are excused from reciting the Pledge are permitted to remain quietly standing or sitting at their desks while others recite the Pledge.⁹

The reference to Federal Public Law concerning the protocol for showing respect during the recital of the Pledge is superfluous. Furthermore, a version of the law is cited that does not provide for the exception "when the headdress is worn for religious purposes." If the Legislature wishes to cite to Federal Public Law, it may wish to cite to the 2002 amended version of the law that includes the exception for non-religious headdress.¹⁰

The joint resolution specifies that the Pledge will read:

I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

⁶ Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 St. Thomas L. Rev. 61, 75 (2002); see *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958).

⁷ Section 101.161(1), F.S.

⁸ U.S. Const. amend. I.

⁹ See *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Frain v. Baron*, 307 F. Supp 27 (E.D.N.Y. 1969).

¹⁰ 4 U.S.C.A. § 4 (West 2002).

The language of the ballot summary reads:

Proposing an amendment to the State Constitution to require the daily recital of the pledge of allegiance to the American flag in the public schools of this state, to provide for a student to be excused from reciting the pledge upon written request by the student's parent, and to provide protocol for showing respect during the recital.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The First Amendment to the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The seminal case cited as controlling precedent in challenges to the Establishment Clause is *Lemon v. Kurtzman*.¹¹ Here, the U.S. Supreme Court enacted a three-pronged test in its review of Establishment Clause issues, commonly known as the Lemon test, which requires that all government action:

- Have a secular purpose;
- Not have the primary effect of either advancing or inhibiting religion; and
- Not result in excessive government entanglement with religion.¹²

In acknowledging that case precedent does not require a total separation of church and state, the *Lemon* court recognized, "Some relationship between government and religious organizations is inevitable."¹³

The term "ceremonial deism" has been coined to indicate the historic, traditional inculcation of religious reference into government practice. By way of example, scholars point to the national motto ("In God We Trust"); the invocation of the deity before judicial and legislative proceedings; prayers at high school and college graduations;

¹¹ 403 U.S. 602 (1971).

¹² *Id.* at 612-13.

¹³ *Id.* at 614.

religious symbols embedded in government seals; the religious reference in U.S. currency; oaths of public officers, court witnesses, and jurors; the use of “in the year of our Lord” to date public documents; and the addition of “under God”¹⁴ into the Pledge of Allegiance.¹⁵

As case law on the establishment clause has developed over time, courts appear to be moving in the direction of prohibiting apparent, excessive displays of religion, while endorsing those governmental actions that have a de minimus, or slight impact or threat to religious freedom.¹⁶ As Justice Brennan stated in a dissenting opinion in *Lynch v. Donnelly*, “the reference[] to God contained in the Pledge of Allegiance can best be understood . . . as a form [of] ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content.”¹⁷

In the 1963 case of *School District of Abington Township v. Schempp*, the Supreme Court invalidated portions of a Pennsylvania statute that required the reading of Bible passages in public schools, as well as school prayer, but left intact the recitation of the Pledge of Allegiance.¹⁸ Subsequent cases reviewing forms of religious reference in government other than the Pledge of Allegiance have nonetheless indicated support for a Pledge of Allegiance, including the “under God” provision.¹⁹

In 1992, the Seventh Circuit Court of Appeals reviewed an Illinois statute that compelled the recitation of the Pledge of Allegiance in public schools.²⁰ Here, the court found critical to its decision the issue of whether pupils were free to refuse participation. Even where a statute contains an exemption to reciting the Pledge, the court posited, unconstitutional coercion is still possible.²¹ The court cited the 1943 case of *West Virginia State Board of Education v. Barnette* in which the court struck down a West Virginia statute that provided for a compulsory recitation of the Pledge of Allegiance, and ordered expulsion for students who refused participation.²² Although the imposition of a formal penalty is decisive to a finding of unconstitutionality, the *Sherman* court held, the potential impact of unwritten penalties should not be overlooked, such as that “the displeasure of one’s teacher can be formidable.”²³

In 2002, the Ninth Circuit Court of Appeals reversed the district court decision dismissing Michael Newdow’s challenge to the constitutionality of the words “under

¹⁴ Stephen B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2118 (1996).

¹⁵ *Id.* at 2088-2089, 2096-2097.

¹⁶ *Id.* at 2166.

¹⁷ 465 U.S. 668, 716 (1984).

¹⁸ 374 U.S. 203 (1963)

¹⁹ *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O’Connor, J., concurring) (stating “In my view, the words ‘under God’ in the Pledge . . . serve as an acknowledgment of religion with ‘the legitimate secular purposes of solemnizing public occasions’” (citations omitted)).

²⁰ *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992).

²¹ *Id.* at 441.

²² *Id.* at 439 (citing *Barnette*, 319 U.S. 624 (1943)).

²³ *Id.* at 442.

God” in the Pledge Allegiance.²⁴ The Ninth Circuit held that “(1) the 1954 Act²⁵ adding the words ‘under God’ to the Pledge, and (2) EGUSD’s²⁶ policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause” of the U.S. Constitution.²⁷ In *Elk Grove Unified School District v. Newdow*, the U.S. Supreme Court failed to reach the merits of the case, holding that Newdow lacked prudential standing to bring the suit in federal court.²⁸ In her concurring opinion, Justice O’Connor concluded that the words “under God” in the Pledge fit the category of ceremonial deism.²⁹ “Any coercion that persuades an onlooker to participate in an act of ceremonial deism[,]” such as reciting the Pledge, “is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.”³⁰

In 2005, the Fourth Circuit U.S. Court of Appeals in *Myers v. Loudoun County Public Schools* affirmed the district court’s holding that the voluntary recitation of the Pledge of Allegiance in Virginia’s public schools did not have a religious purpose or effect and did not create an excessive governmental entanglement with religion. The *Myers* court found that the issue of unconstitutional coercion is not applicable because the Pledge is not a religious exercise and does not threaten an establishment of religion.³¹ The court stated that “the fact that indirect coercion may result from voluntary recitation of the Pledge in school classrooms is of no moment under the Establishment Clause.”³² Further, the court classified the Pledge as a patriotic exercise, rather than a religious exercise.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Department of State estimates that the cost of advertising a proposed constitutional amendment, as required by s. 5(d), art. XI, Fla. Const., statewide is \$50,000. If the ballot summary is greater than 75 words or the constitutional amendment is lengthy, the cost estimate could be more.

²⁴ *Newdow v. U.S. Cong.*, 292 F.3d 597, 600 (9th Cir. 2002), *rev’d*, 542 U.S. 1 (2004).

²⁵ The Pledge of Allegiance is currently codified at 4 U.S.C. § 4 (2002).

²⁶ Elk Grove Unified School District’s

²⁷ *Newdow*, 292 F.3d at 612.

²⁸ 542 U.S. 1 (2004).

²⁹ *Id.* at 42 (O’Connor, J., concurring).

³⁰ *Id.* at 44.

³¹ 418 F.3d 395, 397, 408 (4th Cir. 2005).

³² *Id.* at 408.

District school boards will be required to adopt rules regarding the recitation of the Pledge of Allegiance. The cost of adopting rules is expected to be insignificant.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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